IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL SECOND APPEAL No. 138 of 1989

M/S. NATHURAM GULABCHAND, GANGAPUR
V/S
RAJ. STATE ELECTRICITY BOARD & ANR.

Mr. NS RAJPUROHIT for Mr. JAI KISHAN BHAIYA, for the appellant / petitioner

Mr. GM BHANDARI, for the respondents.

Date of Order : 4.12.2006

HON'BLE SHRI N P GUPTA,J.

ORDER

Heard learned counsel for the parties.

The application dt. 25.11.2006 is allowed. Name of the respondent no. 1 and 2 is ordered to be substituted by the authorities mentioned in the prayer clause. The amended cause title has already been filed. The same is taken on record. Mr. Bhandari appears for the substituted respondents. As such the matter has been heard.

This appeal has been filed by the plaintiff against the judgment and decree of the learned District Judge, Bhilwara dt. 23.8.1989, setting aside the judgment and decree of the learned Civil Judge, Bhilwara dt. 5.9.1983, and thereby dismissing the plaintiff's suit.

The facts of the case are, that on 22.3.1978 the plaintiff filed a suit for declaration and injunction, alleging interalia that the plaintiff is a registered partnership firm running a Cotton Ginning Factory in the name and style of Baldev Cotton Ginning Factory, and for operating that they have a 30 Horse Power electric connection. It was alleged that according to the Tariff the factory is seasonal factory, and energy charges are being recovered from him treating it as a seasonal factory, and according to the Tariff applicable in July, 1974 the plaintiff is liable to pay Rs. 2400/- per annum as minimum charges. It was alleged that before coming into force of the Tariff, the plaintiff's factory was closed in April, 1974 on account of season being over, and was reopened in November, 1974. It was alleged that according to old Tariff, only such factories are treated to be seasonal factory which work at the most 8 months an year. Then, in 1976 the definition was changed whereunder the factories working to the maximum of 7 months an year were treated to be seasonal factories. It was alleged that the plaintiff has been regularly paying the energy charges for the electricity consumed, and in the lay season the consumption does not exceed the minimum charges. Then, it is alleged that according to Clause 9 of the Tariff of 1974, Ice Factory, Ginning & Pressing Factory, and such other factories as may be notified by the Government have been treated to be seasonal factory, and that the requirement of

giving one month's prior notice is applicable to such other notified industries only. Then, it is alleged that the plaintiff received a bill of March, 1978 showing consumption of 10680 units, for which the amount shown was Rs. 2566.22, and therein Rs. 3536.69 were demanded as objection raised by the audit party, treating the plaintiff's factory as non seasonal factory, and the plaintiff was called upon to deposit the amount. The plaintiff, however, deposited the consumption charges, and objected for the remaining amount. Thereupon the plaintiff was threatened with the disconnection of energy supply, therefore, the suit has been filed, praying for a declaration, that demand of non seasonal charges amounting to Rs. 3536.69 is illegal and void, and for direction to the defendant to receive the balance amount, and not to disconnect the energy supply.

The defendant filed a written statement contending that for the seasonal factory, of course, the minimum charges is Rs. 2400/- per year, but then since the plaintiff did not comply with the requirement of seasonal factory, therefore, the plaintiff was not treated to be seasonal factory, and that in order to claim the benefit of seasonal factory, apart from the requirement of working to the maximum of specified number of months, the other requirement is, about serving a notice, at least a month before the proposed closure. Specifically this was the

stand taken. It was also contended that in view of Section 31 of the General Conditions of Supply, since there is a provision for arbitration, therefore, the suit is not maintainable.

In trial, the plaintiff has examined two witnesses, while the defendant did not lead any evidence. The learned trial court found, that it is not in dispute that the demand was raised on the objection being raised by the audit party, as is mentioned in bill Ex.-3, and that it is established from the evidence that the plaintiff's factory does not work beyond seven months, and according to the definition given in Clause 9 the Ginning and Pressing Factory is included therein, and therefore, the plaintiff's factory is a seasonal factory, apart from the fact that even the defendants had been treating it as a seasonal factory continuously, for number of years. Interalia with these findings, the decree was passed, as prayed.

In appeal, the learned trial court reversed the decree, by finding, that from the provisions of Clause 9 it is clear, that Clause 9 provides various consequences being in the nature of benefits available to the seasonal factory, and sub-clause (i) thereof requires giving intimation in writing, one month in advance of closure, the months or the period of off season during which he will close down his plants, to the concerned Sub-Divisional

Officer of the Board, and since in view of the learned lower Appellate Court, it cannot be done, that the benefits provided in other four clauses are given without complying with the requirement of sub-clause (i) of Clause 9, and therefore, since admittedly the plaintiff has not given notice of closure, the plaintiff has rightly been treated to be a non seasonal factory. With these findings suit has been dismissed.

Appeal was admitted on 24.11.1992 by framing following two substantial questions of law:-

> "1. Whether the condition regarding service of one month notice is not applicable for the Ginning and Pressing factory of the appellant as same is expressly included in the definition 'seasonal factory'?
>
> 2. Whether the respondents have waived the condition of notice by continuously billing the appellants as a seasonal factory even 3 ½ years after the notification dated 28.5.74?"

Arguing the questions, learned counsel for the appellant relied upon a judgment of this Court dt. 13.9.2001, passed in S. B. Civil First Appeal No. 91/1980, R.S.E.B. & Anr. Vs. Sh. Ikling Cotton Ginning & Pressing Factory, and submitted, that the controversy involved in that case, and the present case, is exactly identical, and the impugned judgment is required to be set aside on that

ground.

On the other hand, learned counsel for the respondent supported the impugned judgment, and tried to distinguish the judgment in Ikling Cotton Ginning's case by contending, that in that case firstly there was an agreement between the consumer and the Board, stipulating it to be a seasonal factory, and secondly in that case the plea of waiver of notice by the conduct of the defendants, by issuing bills to the plaintiff, treating it as seasonal factory was not taken, and therefore, that judgment is not applicable to the present case.

I have considered the submissions.

At the outset I may observe that of course in the present case there is no pleading about there being an agreement between the parties, to the effect that the plaintiff factory would be seasonal factory, and may be that in Ikling Cotton Ginning's case the question of waiver may not have been raised, but then a look at the judgment in Ikling Cotton Ginning's case shows, that in para-7 the provisions of Clause 9 was quoted, and it was held, that in the definition there is a specific inclusion of Ginning and Pressing Factory, and it was considered, that the plaintiff was accepted as Ginning & Pressing factory, and the defendant entered into agreement to treat the plaintiff as

the seasonal factory. Then, in para-8 it was noticed, that admittedly bills were issued for the electricity consumption treating the plaintiff as seasonal factory, and the dispute is clear from Annexure-5, that the defendant claimed Rs. 14,262/- as the old dues and there is mention that this is issued as per objection of the audit party, and there is no case of the defendant that this bill was issued after any notice to the plaintiff for treating the plaintiff as non-seasonal factory for the period for which the arrears is said to be claimed. Then, it was noticed, that in the written statement the plea taken by the defendant is, that the plaintiff has not served the notice as required under sub-clause (1) of Clause 9 of the Tariff Rules, 1974, and it was held, that when the plaintiff was treated as seasonal factory, billed for as seasonal factory for a long period since 1972, and the disputed period is also covered in the bills, which were issued to the plaintiff, saying that plaintiff is a seasonal factory, then if there was non-compliance of the conditions, then the defendant failed to plead under which circumstances the above bills were issued, treating the plaintiff as seasonal factory. Then it was held, that the defendant has failed to plead and prove, for which month or for which year notice was not given by the plaintiff as per the sub-clause (1) of the Clause 9, and therefore, considering the conduct of the defendant, in issuing the bills to the plaintiff, treating it as seasonal factory for the disputed period, they were

held to be estopped, and the suit of the plaintiff therein was decreed.

Coming to the facts of the present case also, what is significant to note is, that the period in dispute is from April, 1974 to March, 1978, and even according to the defendant the Tariff was published in the Gazette in May, 1974, and was to come into force from July 1974. It passes all comprehension, that the plaintiff can be expected to be under obligation to give notice in writing, one month before closure, which was closed in April 1974, and on failure, it being held to be non seasonal factory. Thus in any case demand raised from July 1974 onwards, at least for the year 1974, cannot be sustained on this count alone. Then, so far the years 75, 76 and 77 are concerned, admittedly, even the defendant has been treating the plaintiff to be a seasonal factory, all through, and nobody has appeared in the witness box on the side of the defendant to depose, as to how they treated the plaintiff to be a seasonal factory, or as to how the plaintiff is not entitled to be billed as seasonal factory, and/or how the bills were issued treating the plaintiff to be seasonal factory. This is one aspect of the matter.

The other aspect of the matter is, that even on reading of Clause 9, which specifically includes Cotton Ginning & Pressing Factory, as seasonal factory, it would

too much to allow the defendant to claim energy charges from the plaintiff, treating it to be non seasonal, simply because the plaintiff did not give notice, as alleged, and notwithstanding the fact that the defendant had been treating it to be seasonal factory, during the period in question.

The net result of the above discussion is that both the substantial questions of law, as framed, are required to be, and are, answered in favour of the appellant.

The appeal is therefore allowed, and the impugned judgment and decree of the learned lower Appellate Court is set aside, and that of the learned trial court is restored. The parties shall bear their own costs.

Before parting with the case, I am constrained to observe that in continuation of what I had reported earlier, today again I requisitioned from Library the Rajasthan State Electricity Board Tariff published in May, 1974, and the old Tariff also. The case was taken up a bit past three, and at around 3.30 the book was requisitioned from Library, but then till twelve past four, the book was not made available, by which time I was in the midst of dictation of the judgment. It is obvious, that I had to render judgment handicapped of the book. Copy of this part

of the judgment be forwarded to the Registrar concerned, to be placed on the service record of the Librarian.

(N P GUPTA),J.

/Sushil/